

Supreme Court, U.S.  
FILED

DEC 2 1987

JOSEPH F. SPANIOL, JR.  
CLERK

NO. 65 ORIGINAL

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1987

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO,

*Defendant,*

THE UNITED STATES OF AMERICA,

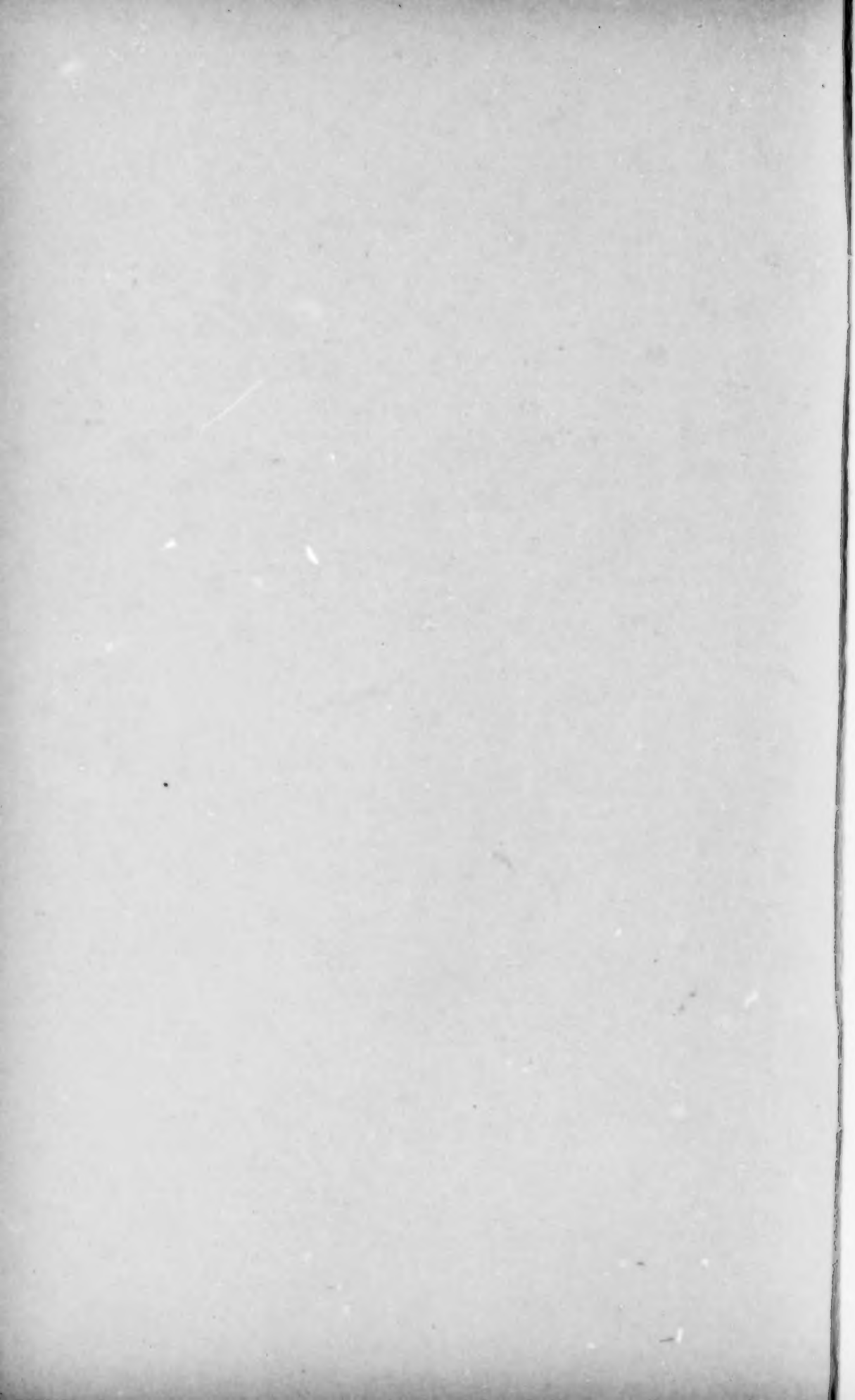
*Intervenor.*

CHARLES J. MEYERS, SPECIAL MASTER

REPORT

November , 1987

2284



## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. THE PROPOSED AMENDED DECREE .....	2
III. THE PECOS RIVER MASTER'S MANUAL .....	7
A. Brantley Reservoir and McMillan Training Dike ...	7
B. Depletions Attributable to Man's Activities .....	9
 PROPOSED AMENDED DECREE .....	 1
Exhibit A. Order of Reference .....	A-1



## INTRODUCTION

In July, 1986, I filed a Report in this case proposing findings, conclusions and a decree that would bring an end to this litigation, at least for the time being. But I also expressed concern that the case would be back in court before long, for two reasons: (1) New Mexico would have difficulty in repaying, in water, the 340,100 acre feet I found she owed Texas, and (2) disputes over future deliveries would wind up in litigation, since the Pecos River Commission could not be expected to be any more effective in the future than it had been in the past. To solve these problems, I suggested that the Court might wish to consider a judgment for money damages to remedy past shortfalls and the appointment of a River Master to administer the decree in the future. Both suggestions were adopted, and the case was remanded to me to consider the question of remedy and "to recommend an amendment to the decree, specifying . . . the duties of the River Master and the consequences of his determinations. Any other suggestions for amendments should also be called to our attention." 107 S. Ct. 2279, 2287 (1987). I have set the remedies question for trial in February of 1988. By agreement, the parties have included in the issues to be tried the shortfall, if any, for the period 1984 through 1986. Those three years will be tacked on to the administrative period of 1950 through 1983, which was the subject of this Court's decision on June 8, 1987.

This Report addresses the regime that will govern the river from 1987 forward. More particularly, it recommends an Amended Decree which, in addition to enjoining New Mexico to comply with her Article III(a) obligation, provides for the appointment of a River Master, sets forth the River Master's duties and powers and the consequences of the River Master's determinations, and incorporates the Pecos River Master's Manual to guide the River Master in performing his or her

duties. Before turning to specific points in the proposed Amended Decree and the Manual, I draw to the Court's attention the desirability of appointing a River Master and entering a decree this Term of Court, despite the press of other business. Water year 1987 will be the first year to which the new regime applies. Under the proposed Amended Decree, the River Master will make his determinations for water year 1987 in 1988, and New Mexico must satisfy any shortfall for 1987 by March 31, 1989. Adherence to this schedule will best be accomplished by having a River Master in place as early as possible in 1988. This suggests a hearing on exceptions to this Report this Term, if at all possible. The proposed Amended Decree presumes that it will take effect in 1988.

## II

### THE PROPOSED AMENDED DECREE

It is my recommendation that the proposed Amended Decree replace the June 8, 1987 Decree set forth in 107 S. Ct. at 2287, so that a complete charter for the enforcement of the Court's judgment is available in one place for the River Master. The proposed Amended Decree includes, of course, the substance of the Court's June 8, 1987 Decree.

Several components of the proposed Amended Decree deserve brief comment. Since the data required for the calculation of New Mexico's delivery obligation for a given year are not available until the year following, the Amended Decree directs the River Master to make determinations for a particular "water year" in the following year, termed the "accounting year." If, in the accounting year, New Mexico is found to have fallen short of her delivery obligation, the Amended Decree allows her through March of the year following the accounting year to make up the deficiency. New Mexico objects to this provision and proposes instead that she be

allowed to accumulate credits and shortfalls year to year and be deemed in default only when total accrued shortfalls exceed thirty percent of her delivery obligation for any five-year period, and then only to that extent. She offers several arguments in support of this proposal.

First, New Mexico takes the position that, since the flow of the Pecos is highly variable, she may be asked to bear heavy delivery burdens at large economic cost. She argues that such costs would be unnecessary if the delivery obligation was smoothed out over a longer period than the yearly delivery requirement contemplated in the proposed Amended Decree. I am not persuaded. While it is desirable to avoid unduly heavy delivery requirements, a 30% rule measured over a five-year accounting period creates unacceptable risk, in my view. The probabilities are very high that New Mexico would fall farther and farther behind in her III(a) obligation over time. A review of Table 2 in Texas Exhibit 79 (p. 5) shows mounting deficits over time despite intermittent positive departures. Under her proposal, it seems very likely that early in the administration of the decree — indeed, quite possibly at the end of the first five years — New Mexico would be in debt for 30% of her accumulated Article III(a) obligation. On the average, for the period 1950-1983, she was in default by 10,000 acre feet per year. So long as the principle survives that New Mexico owes water to Texas under the Compact, the only sure, or even probable, way of honoring that principle is to make the delivery obligation an annual one. The Court has clearly indicated that the remedy of money damages, if appropriate at all, is an extraordinary, one-time solution to an exceedingly difficult remedial problem and that future performance is to be in kind. 107 S. Ct. at 2285-86.

Second, New Mexico argues that the Court recognized in its June 1987 opinion that it was impracticable to expect New Mexico to satisfy shortfalls on an annual basis. As evidence thereof, New Mexico cites language in the opinion to the effect

that "shortfalls or credits will be reflected in [New Mexico's] later delivery obligations." 107 S. Ct. at 2287. New Mexico urges that her proposal for accumulation of credits and shortfalls is consistent with this language. I do not read the language as intending to suggest that New Mexico should not be required to keep herself current. Such a reading is completely at odds with the Court's view that in the future, Texas should receive its water. The Court had before it a clear example of the pitfalls of accumulation — a debt so large that payment in water could be exceedingly difficult.

Finally, New Mexico argues that even if she holds man's activities to the 1947 level, there will still be negative departures from the 1947 condition that are properly attributable only to "the vagaries in the flow of the Pecos River." As support for this proposition, New Mexico cites the fact that the 1947 condition curve itself, Figure 1 of Texas Exhibit 68 (p. 3), represents a number of scattered points, none falling exactly on the curve and all reflecting man-made uses at the permissible 1947 level. In the future, the argument goes, we can expect similar departures from the curve without changes in man's activities. To be sure, the curve is not an exact representation of the scattered points it seeks to define. But it is the law of the case. Nearly four years ago, my predecessor concluded that "the curve of relationship shown by Texas Figure 1 on p. 3 of Texas Exhibit 68 and the accompanying Table 1 on p. 4 correctly quantify the obligation of New Mexico to Texas as the same is stated in Compact Article III(a), as implemented by the Master's decision of August 13, 1979, and approved by the Supreme Court in its decision reported at 446 U.S. 540." Report and Recommendation, filed 2/27/84, at p. 13. This conclusion was approved by the Court. 467 U.S. 1238 (1984). Even if the point was not settled, I see no other way to administer this Compact. The 1947 condition, as defined in these proceedings, has to be translated into a water quantity to provide a numerical standard for measurement of compliance.



and this necessarily involves a margin of error. I might add that the margin of error here is not one-sided: Texas suffers equally when the curve errs on the side of understating the Article III(a) obligation. Tr. pp. 44-46, 61 (10/15/87).

The proposed Amended Decree affords New Mexico maximum flexibility in determining how to satisfy any shortfall. The state is given the opportunity, with respect to each year of shortfall, to submit a plan as to how she will remedy the shortfall. The plan must identify the source of the make-up water and specify a delivery schedule so that satisfaction of the shortfall can be verified, but New Mexico is given the freedom to determine the sources of the make-up water and (within certain limits) the timing of its delivery. Moreover, those determinations may change from year to year as circumstances vary. New Mexico is not seriously constrained by Article IX of the Compact, which requires application of "the principle of prior appropriation within New Mexico"; with or without this provision she would have been compelled to honor intrastate priorities in providing the water to satisfy Article III(a). But she remains free to buy, lease or otherwise obtain the necessary water, so long as priorities are not disturbed.

The Amended Decree anticipates that satisfaction of any shortfall will be determined by means of the procedures and equations set forth in the Manual. In other words, a calculation will be performed using the Manual to determine the amount of water that can be presumed to arrive at State line as a result of the specific actions proposed by New Mexico. If that amount equals the amount of the shortfall, New Mexico's actions will be deemed to satisfy the shortfall. Given the fungibility of water, this was thought to be the best way of ensuring that State line flows are actually increased by the amount of a shortfall, while still allowing New Mexico to engage in private ordering to satisfy the shortfall. Any arrangement which contemplates simply gauging the flow at State line to verify delivery of make-up water is unworkable. No physical means of distinguishing

make-up water from III(a) obligation water exists; calculations alone can make the distinction.

The River Master's duties are set out in some detail in the Amended Decree. Unless and until a change is proposed in the Manual, the River Master's function is largely ministerial, although some judgment may be required from time to time in the selection of numerical values. The need for sound judgment will arise when one party seeks to modify the Manual without the concurrence of the other party. The Amended Decree does not empower the River Master to initiate changes in the Manual. It was thought to be more cost effective to leave the initiative to the parties, since their experts will have to evaluate a proposed change in any event. Moreover, there is no need to incur the risk of a bureaucratic build-up in the name of research in the office of the River Master. On the other hand, the River Master is correctly delegated the power to decide in the first instance the propriety of proposed but contested changes in the Manual. For the most part, these proposed changes are likely to raise technical issues of hydrology or statistics, as to which the River Master will have expertise. Because of that expertise, the recommended standard of review is whether the River Master's findings or conclusions are clearly erroneous. Of course, a change agreed to by both parties, whether proposed through the Pecos River Commission or directly to the River Master, is binding.

Finally, the Amended Decree recommends the dismissal of the United States from this action without prejudice. At the request of the Solicitor General, the United States was excused from participation in the proceedings at an early stage. I informed the Solicitor General of my intention to recommend dismissal and he interposed no objection in his written reply.

## III

**THE PECOS RIVER MASTER'S MANUAL**

The parties have agreed on all of the provisions in the Manual except one — the provision dealing with the accounting for depletions caused by McMillan Dike. In addition, New Mexico objects to the absence from the Manual of provisions which she contends would have required a separate determination of the depletions resulting from man's activities in New Mexico. At a hearing on October 15, 1987, evidence was presented on these two issues and, following the hearing, post-hearing briefs were submitted. Based on the evidence and argument, I find that New Mexico should not be charged for the salvage accomplished by the Dike in the past which will be continued in the future upon the completion of Brantley Reservoir. I have also concluded that removal of references in the Manual to man's activities was entirely appropriate. Submitted with this Report is Texas Exhibit 108, which incorporates the agreements of the parties and my findings with respect to the disputed issues.

**A. Brantley Reservoir and McMillan Training Dike.**

As set forth in my July 1986 Report, the McMillan Training Dike was constructed in 1954 for the purpose of reducing leakage from McMillan Reservoir and was successful in doing so. The Report recommended that New Mexico not be charged for the salvage accomplished by the Dike, and the Court accepted that recommendation. July 1986 Report, pp. 11-22, 31. Brantley Reservoir will replace McMillan Reservoir and is expected to be completed in 1988. When that occurs, McMillan Dam will be breached and the Dike will no longer serve any function except in cases of extreme flood. Tr. 40-42 (10/15/87).

Texas argues that since water will no longer be salvaged by the Dike once McMillan Dam is breached, the Manual should provide for the elimination of the credit to New Mexico at that time. I think this argument misapprehends the basis for the

credit. The flood in the winter of 1941-42 washed away natural sealing materials in McMillan Reservoir and left caverns and crevices in its east side, through which large quantities of water escaped. The 1947 condition reflected those losses. When the Dike was completed in 1954, the losses were reduced, but the inflow-outflow equations then in effect did not take account of this change in the 1947 condition. When the Pecos River Commission agreed in 1961 to credit the salvage, it authorized a change in the 1947 condition. That change was quantified by the Commission itself for the period 1950-1961, when it agreed that the savings were 48,000 acre feet. For the period 1962-1983, there was no agreement by the Commission on the quantity in acre feet that was salvaged, but Texas herself, through the testimony of an expert, Dr. V. R. Krishna Murthy, established an equation for calculating the savings for the later period. Dr. Murthy's calculation showed savings of 27,600 acre feet, which I proposed be credited to New Mexico. July 1986 Report, pp. 21-22. The Court adopted the recommendation. Thus, Dr. Murthy's equation became part of the Manual, and I have concluded that it should remain a part of the Manual.

The testimony of New Mexico's State Engineer, S. E. Reynolds, at the October 15, 1987 hearing was not at odds with this conclusion. While Mr. Reynolds agreed that the Dike would no longer serve the physical function of impeding losses from McMillan after the dam is breached, he did testify to his understanding that the Commission changed the inflow-outflow equation to reflect its decision not to charge New Mexico with the salvage accomplished by the Dike. Tr. 70-75 (10/15/87). Whatever the Supreme Court may have decided about the 1947 condition in 1984 when it approved the Special Master's conclusions regarding Figure 1 of Texas Exhibit 68, the Court decided in 1987 that the salvage accomplished by the Dike should not be charged to New Mexico, presumably for the reason advanced in my Report (pp. 11-22) that the 1947 condition was modified by action of the Commission. Since the

Commission's action provides no reason to distinguish between the 1950-1983 period and the 1987-forward period, the Texas contention is rejected.

**B. Depletions Attributable to Man's Activities.**

In its post-hearing brief, filed October 27, 1987, New Mexico argues strenuously, as it did at the October 15, 1987 hearing, that certain of the departures from the 1947 condition are due to the vagaries of the flow of the river and not to man's activities in New Mexico. As with its 30% proposal for administering the Compact, New Mexico's argument is that the 1947 condition curve is not completely accurate in representing the 1947 condition, and thus New Mexico should not be held responsible for departures from the curve absent a determination that the departures are due to man's activities. (New Mexico presents this proposal as an alternative to its 30% proposal. She contends that one or the other is necessary to address the problem of the erratic flow of the river.)

New Mexico realizes that this argument is a direct attack on the findings and conclusions recommended in my July 1986 Report and adopted by the Court in June 1987. I stated in my Report that I accepted the testimony of Dr. Murthy that his equations, as embodied in Texas Exhibit 79, accounted for all the natural losses in the system and that the remaining losses were thus attributable to man's activities. I am not prepared to reconsider this issue, although I recognize that a change in physical circumstances may provide a basis in the future for an application by New Mexico to the River Master, the Pecos River Commission, or the Court for a change in the inflow-outflow equation. For example, in his testimony on October 15, 1987, Mr. Reynolds hypothesized a sudden increase in channel losses from one year to the next of 20,000 acre feet, owing to proliferation of salt cedars and deterioration of the channel. Tr. 53-56 (10/15/87). I suggested that such a change would require modification of the Manual and the witness seemed to agree. *Id.* at 55.



The inflow-outflow equation is not a formulation by an Einstein of an immutable law of physics; it expresses a relationship between inflows to the river and outflows at the state line, taking account of various natural losses before imputing the outflow that would have occurred under the 1947 condition. A flood like that in the winter of 1941-42 or a plague of salt cedars may require changes in the equation. With the Amended Decree in place and the River Master in office, a mechanism is available for making appropriate changes. I reject completely the notion that every year the River Master must determine the level of man's activities and their effect on the river's flow. If Dr. Murthy is correct, as I believe him to be, the task is as unnecessary as it is impossible.

New Mexico also objects to the deletion from Texas Exhibit 108 of language which was included in Texas Exhibit 103 and which related to the determination of the total depletions resulting from man's activities. New Mexico argues that Texas should be precluded from changing its theory of accounting at this late date. I am confident that Texas Exhibit 108 reflects no such change, and thus I reject New Mexico's argument.

During my service as Special Master, Texas has consistently taken the position that the calculations prescribed in Texas Exhibits 68, 79, and 103 account for all natural depletions of the stream so that any residual departure from the 1947 condition can be presumed to be the result of man's activities. It is true that Texas Exhibit 103 was submitted after Texas was informed that I had accepted her accounting theory, and yet it included provisions calling for a determination of depletions resulting from man's activities. Texas explains the inclusion of these provisions as nothing more than a contingency in case the Court refused to accept its theory and instead required a separate accounting. I accept this explanation as entirely rational and credible. Furthermore, I do not believe that New

Mexico was misled by the presence of the language in Texas Exhibit 103. New Mexico has known at least since March 18, 1986, when my Draft Report was circulated, that in my view Dr. Murthy's equations account for all natural losses, leaving residual losses to be attributed to man's activities in New Mexico.

The proposed Amended Decree and the Pecos River Master's Manual are submitted with this Report, and they incorporate the proposed findings and conclusions stated above.

Denver, Colorado, November ....., 1987.

---

Charles J. Meyers  
Special Master





**PROPOSED AMENDED DECREE**



## **PROPOSED AMENDED DECREE**

**IT IS ORDERED, ADJUDGED AND DECREED THAT**

### **I**

#### **DEFINITIONS**

**A. For purposes of this Decree:**

1. "Accounting year" is the calendar year during which the River Master makes the calculations required by Article III.B.1. below; "water year" is the calendar year immediately preceding the accounting year.

2. "Manual" is the Pecos River Master's Manual, admitted into evidence as Texas Exhibit 108 and attached to this Decree as an integral part hereof. The Manual may be modified from time to time in accordance with the terms of this Decree.

3. "Overage" is the amount of water delivered by New Mexico in any water year which exceeded the Article III(a) obligation for that year.

4. "Shortfall" is the amount by which the water delivered by New Mexico in any water year fell short of the Article III(a) obligation for that year.

### **II**

#### **INJUNCTION**

**A. The State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:**

1. To comply with Article III(a) of the Pecos River Compact and to meet the obligation thereof by delivering water to Texas at State line as prescribed in this Decree.

2. Within thirty (30) days of receipt of a Final Report of the River Master identifying a shortfall, to submit to the River Master a proposed plan providing for verifiable action by New Mexico that will increase the amount of water at State line prior to March 31st of the year following the accounting year by the amount of the shortfall. In order to identify the incremental amount of water being delivered to Texas to satisfy a prior shortfall, the plan shall:

(a) Identify the specific actions to be taken by New Mexico to increase the amount of water flowing to Texas, including, if applicable, the points at which water will enter the river or diversions will be curtailed;

(b) Specify the dates and times the actions will be taken;

(c) Provide a calculation under the procedures and equations set forth in the Manual of the amount of water that can be presumed to arrive at State line as a result of the actions;

(d) Identify the means by which the actions can be verified and provide assurances that documents and data necessary for verification will be submitted to the River Master within thirty (30) days from the date the actions are taken;

(e) Provide guarantees that the water to be delivered pursuant to the plan will not be diverted within New Mexico.

3. To comply prior to March 31st of the year following the accounting year with the terms of an Approved Plan to remedy any shortfall. Compliance with an Approved Plan will be deemed to satisfy the shortfall. Subject to the review provided in Article III.D. of this Decree,

the calculations made pursuant to Article II.A.2(c), as approved by the River Master, shall be determinative of the amount of water delivered at State line.

### III

#### RIVER MASTER

A. *Appointment.* The appointment of a River Master will be made by an Order of Appointment in the form attached hereto as Exhibit A.

B. *Duties.* The River Master shall perform the following duties:

1. Calculate in accounting year 1988, beginning with water year 1987, and continuing every year thereafter, pursuant to the methodology set forth in the Manual:

- a. The Article III(a) obligation;

- b. Any shortfall or overage, which calculation shall disregard deliveries of water pursuant to an Approved Plan;

- c. The net shortfall, if any, after subtracting any overages accumulated in previous years, beginning with water year 1987.

2. Deliver to the parties a Preliminary Report setting forth the tentative results of the calculations required by Section III.B.1. of this Decree by May 15th of the accounting year;

3. Consider any written objections to the Preliminary Report submitted by the parties prior to June 15th of the accounting year;

4. Deliver to the parties a Final Report setting forth the final results of the calculations required by Section III.B.1. of this Decree by July 1st of the accounting year;

5. Review any plan proposed by New Mexico pursuant to Article II.A.2. of this Decree for its efficacy in satisfying any shortfall and consider any written objections to the plan which are submitted by Texas by September 1st of the accounting year;

6. Modify the proposed plan as is deemed necessary to ensure satisfaction of the shortfall and deliver to the parties such Approved Plan by October 1st of the accounting year;

7. Deliver to the parties and file with this Court a Compliance Report by June 1st of the year following any accounting year in which there is an Approved Plan, which report shall include a finding of New Mexico's compliance or non-compliance with the terms of the Approved Plan and the reasons for such finding.

*C. Modification of Manual.*

1. The River Master shall modify the Manual in accordance with any written agreement of the parties. Such written agreement shall state the effective date of the modification and whether it is to be retroactive. If retroactive, the agreement shall specify the procedures for making the retroactive adjustments.

2. Absent written agreement of the parties, upon motion by either party and for good cause shown, the River Master may modify the Manual. Opposition to any such motion shall be submitted to the River Master in writing within thirty (30) days after service of the motion or within such extended time as may be allowed by the River Master. Additional written submissions and any oral presentation will be at the River Master's discretion. The River Master may adopt, reject, or amend the proposed modification and shall serve upon the parties his or her written Modification Determination and the grounds therefor. The River Master may also defer decision on a

proposed modification, but if no action is taken within one (1) year of its submission, the motion shall be deemed denied.

3. A modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective.

D. *Effect of River Master's Determination.* Unless stayed by this Court, any Final Report, Approved Plan, Compliance Report, or Modification Determination (hereinafter, collectively, "Final Determination") shall be effective upon its adoption, and shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous. A party seeking review of a Final Determination must file a motion with the clerk of this Court within thirty (30) days of its adoption, which motion shall set forth the Final Determination on which review is sought and a concise statement of the basis of the claim that the Final Determination is clearly erroneous.

E. *Authority of Pecos River Commission.* Nothing in this Decree is intended to displace the authority of the Pecos River Commission to administer the Pecos River Compact, and if the Commissioners reach agreement on any matter, the parties shall advise the Court and seek an appropriate amendment to this Decree.

F. *Communication with River Master.* *Ex parte* communications with the River Master are forbidden. Any written communication with the River Master by motion or otherwise shall be simultaneously served by mail on the opposing party. Any oral communication with the River Master shall be made in the presence of the opposing party, whether by telephone conference call or in person.

G. *Distribution of Costs.* The compensation of, and the costs and expenses incurred by, the River Master shall be approved by the Court and borne equally by the State of Texas and the State of New Mexico.

**IV****DISMISSAL OF UNITED STATES**

A. The United States is dismissed from this proceeding without prejudice.

**V****RETENTION OF JURISDICTION**

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.



**EXHIBIT A**

**ORDER APPOINTING RIVER MASTER**

IT IS ORDERED that [name] be and he/she hereby is appointed River Master of the Pecos River for the purpose of performing the duties set forth in the Amended Decree of [date].

IT IS FURTHER ORDERED that [name], as River Master, shall have the power and authority to subpoena information or data, compiled in reasonably usable form, which he/she deems necessary or desirable for the proper and efficient performance of his/her duties.

IT IS FURTHER ORDERED that the River Master is allowed his/her necessary expenses and reasonable fees for his/her services, statements for which shall be submitted quarterly to the Court for its approval. Upon Court approval, such statements will be paid by the State of New Mexico and the State of Texas.

IT IS FURTHER ORDERED that if the position of River Master becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

No. 65, Original

Supreme Court, U.S.

FILED

MAR 2 1988

JOSEPH E. GRANVILLE, JR.

CLERK

In The

**Supreme Court of the United States**

**OCTOBER TERM, 1987**

**STATE OF TEXAS,**

Plaintiff,

**v.**

**STATE OF NEW MEXICO,**

Defendant.

**Texas' Reply To New Mexico's Exceptions**

**JIM MATTOX**

Attorney General of Texas

**MARY F. KELLER**

First Assistant

Attorney General

**RENEA HICKS\***

Special Assistant

Attorney General

**NANCY N. LYNCH**

Chief, Environmental

Protection Division

**PAUL ELLIOTT**

Assistant Attorney

General

P. O. Box 12548

Austin, Texas 78711-2548

(512)463-2085

Attorneys for Plaintiff

February 25, 1988

\*Counsel of Record



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	4
I. New Mexico has offered no basis for reopening the issue resolved last Term of the proper method for calculating the portion of departures attributable to man's activities, and under principles of finality applicable to original actions, the question is settled for this litigation.	4
II. The Compact and last Term's decision require future annual accountings and reject the concept that New Mexico may accrue water debts to Texas over several years and only repay a limited portion of them.	8
CONCLUSION	10

## TABLE OF AUTHORITIES

### Page

#### Cases:

<i>Arizona v. California</i> , 460 U.S. 605	4, 6, 7
<i>Texas v. New Mexico</i> , 107 S.Ct. 2279	1, 2, 9

#### Statutes:

Pecos River Compact, 63 Stat. 159	<i>passim</i>
-----------------------------------	---------------

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

**STATE OF TEXAS,**

Plaintiff,

v.

**STATE OF NEW MEXICO,**

Defendant.

---

**Texas' Reply To New Mexico's Exceptions**

Texas replies to New Mexico's exceptions to the Special Master's Report filed on December 7, 1987 ("1987 Report"). Citations to transcribed Special Master proceedings will be to the transcript page, followed by the date of the proceeding.

**STATEMENT OF THE CASE**

Filed in 1974, this original action about the Pecos River Compact's apportionment of the waters of the Pecos River between Texas and New Mexico proceeded as a unified case until last Term. Then, in a unanimous decision, the Court bifurcated the case into a part about the past -- remedies for past delivery shortfalls -- and a part about the present and future -- a decree to insure that New Mexico meets its Compact delivery obligations. *Texas v. New Mexico*, 107 S.Ct. 2279 (1987). The issue of remedies for past shortfalls remains with the River Master and is scheduled for trial in mid-May of this year.

At the conclusion of its opinion, the Court entered a decree ("1987 Decree") enjoining New Mexico to comply with its obligations under Article III(a) of the Compact and to determine its compliance using two exhibits, Texas Exhibits 68 and 79.<sup>1</sup> An invitation for suggested amendments to the 1987 Decree prefaced its entry. 107 S.Ct. at 2287. Now before the Court is the Special Master's response to the invitation, in the form of a Proposed Amended Decree, to which Texas takes no exception.<sup>2</sup>

The Proposed Amended Decree requires an annual calculation by the River Master to determine New Mexico's water delivery obligation and any shortfall, using Texas Exhibit 108 ("Manual"). The calculations are to be completed by July 1st of each accounting year -- that is, six months after the end of the year (called the water year) for which the

---

<sup>1</sup> The Court apparently intended to adopt the Special Master's 1986 proposed decree (Appendix A of his 1986 Report) except for the portions about repayment of past shortfalls in water; however, the 1987 Decree omits six words from Article II(b) of the 1986 proposed decree, possibly through a clerical error. With the omitted words inserted in *italics* and without the concluding paragraph retaining jurisdiction, the 1987 Decree provides:

It is Ordered, Adjudged and Decreed that the State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:

(a) To comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at State line each year an amount of water calculated in accordance with the inflow-outflow equation contained in Texas Exhibit 68 at page 2 .

(B) To calculate the Index Inflow component of the inflow-outflow *equation by using the inflow-outflow* and channel loss equations contained in Texas Exhibit 79, modified to reflect the Court's decision of June 8, 1987, as to man-made depletions chargeable to New Mexico. "Index Inflow" shall mean the 3-year progressive average of "annual flood inflows" as those terms are defined in Texas Exhibit 79, Table 2, p. 5.

<sup>2</sup> Texas also has no objection to the recommendation in the Special Master's memorandum of January 27, 1988, to the Court that Dr. Neil S. Grigg be appointed Pecos River Master.



calculations are being performed. If a shortfall is determined, New Mexico must repay the water to Texas within nine months of the determination -- that is, fifteen months after the end of the water year. The River Master may modify the Manual upon motion by either state if the movant shows good cause.

In its exceptions, New Mexico objects to two aspects of the Proposed Amended Decree. It opposes an annual accounting and repayment of its Compact obligations.<sup>3</sup> It also disagrees with the Manual's method for resolving the extent to which departures from its delivery obligations are attributable to "man's activities." Based on these objections, New Mexico argues that the 1987 Decree should be amended differently than recommended by the River Master. As an alternative to amending the 1987 Decree as it requests, New Mexico asks the Court either to return the case to the Special Master for new evidence on the issue of man's activities or to leave the issue for the River Master.

### **SUMMARY OF ARGUMENT**

The two issues New Mexico raises in its exceptions were decided adversely to it less than a year ago by the Court. New Mexico's challenges really are to last Term's decision in this case, not to the Special Master's 1987 Report.

---

<sup>3</sup> Texas addresses the issue in Part II of this reply despite its doubts about whether New Mexico is seriously asking the Court to consider it. The second sentence of its first exception objects to the Proposed Amended Decree's omission of a provision for the accrual of shortfalls, yet none of the headings or subheadings of the supporting brief refers to this issue, and the brief's text makes only three glancing references to it. New Mexico's 1988 Exceptions, at 10 (sentence fragment about New Mexico's alternate proposal on accrual to Special Master); 10-11 (paragraph with references to accrual issue); and 20 (sentence fragment about alternative of accrual). The brief concludes with a sentence requesting the inclusion of an accrual provision. *Id.*, at 25.



Recently, in *Arizona v. California*, 460 U.S. 605 (1983), the Court delineated finality principles applicable to interstate water disputes within the Court's original jurisdiction. The principles apply with even greater force in this case and compel the overruling of New Mexico's exceptions.

New Mexico's central complaint is that the method used to determine the extent to which future departures are attributable to man's activities, and thus chargeable to New Mexico, is wrong. It raised the identical complaint last year, and the Court rejected it. Without presenting any new facts on the question, New Mexico once again asks the Court to reject the Special Master's recommendation on methodology. As explained in *Arizona v. California*, in original actions the Court does not reconsider the correctness of previous factual determinations.

New Mexico perfunctorily argues that it should be allowed to accumulate shortfalls over at least five years and never have to repay thirty percent of them. It offers no legal justification for its argument which, if adopted, would run counter to the Compact and last Term's decision and decree. All require an annual accounting and complete fulfillment of New Mexico's Compact delivery obligations, not a delayed seventy percent fulfillment. Reconsideration of the issue is unwarranted.

## ARGUMENT

### I.

**New Mexico has offered no basis for reopening the issue resolved last Term of the proper method for calculating the portion of departures attributable to man's activities, and under principles of finality applicable to original actions, the question is settled for this litigation.**

Stripped of the technical veneer of its arguments, New Mexico seeks only one thing: a reopening of the central issue the Court resolved against it just last Term in this same case. Its challenge is to last year's decision, not the 1987 Report. This statement is not merely a convenient oversimplification by Texas to avoid a bothersome issue. As the Special Master observed:

New Mexico realizes that this argument [about the proper method to determine depletions due to man's activities] is a direct attack on the findings and conclusions recommended in my July 1986 Report, and adopted by the Court in June 1987....

1987 Report, at 9.

New Mexico acknowledged this point repeatedly during the hearing before the Special Master on the Proposed Amended Decree. For example, its counsel flatly stated that New Mexico was asking the Special Master to "reconsider" his previous determination about how to determine departures attributable to man's activities. Tr. 29-30 (10/15/87); *see also* Tr. 31 (10/15/87) (acknowledging Special Master's view that 1986 Report's treatment of Texas Exhibit 79 extended to Texas Exhibit 107, the precursor to the Manual). New Mexico's chief water official was the only witness during this phase of the case. He testified that New Mexico was offering no new factual evidence, only a reanalysis of old evidence in the case. Tr. 86 (10/15/87).

Further, acknowledgement that New Mexico is seeking to reopen a freshly decided issue occurs when its brief complains that the Special Master "refused...to reconsider his previous decision" on what is mislabeled as the "presumption" about man's activities. New Mexico's 1988 Exceptions, at 6. This

argument crystallizes the issue actually raised -- the reopening of the man's activities issue already resolved by the Court. New Mexico's assertion at the outset of its legal argument that it is not requesting the Court to "reconsider any findings on past shortfalls[.]" *id.*, is somewhat disingenuous; it is requesting the Court to reconsider the established methodological basis for those findings.

Briefly summarized, the methodology used in Texas Exhibit 79 to make the determinations about New Mexico's delivery obligations was to develop equations and procedures that accounted for all natural losses in the Pecos River system in New Mexico, thereby making the remaining losses attributable to man's activities by force of logic. See 1987 Report, at 9; see also 1986 Report, at 8-10.<sup>4</sup> It is undisputed that the Manual, Texas Exhibit 108, employs the identical methodology. Insofar as the argument raised by New Mexico is concerned, the only difference between Texas Exhibit 79 and the Manual is that one applies the methodology to past departures and the other applies it to future departures. The difference is irrelevant to the question of whether last Term's decision approving the methodology should be revisited.

Principles of finality in interstate water disputes within the Court's original jurisdiction were explained in *Arizona v. California*, 460 U.S. 605 (1983), where the Court rejected efforts to reopen issues that had been determined nearly twenty years earlier in the same case. The Court resisted wholesale

---

<sup>4</sup> New Mexico persists in asserting that the Special Master is "presuming" that all departures are attributable to man's activities. New Mexico's 1988 Exceptions, at 6 and 15 (argument headings). It bears repeating that no such presumption is being made. Instead, departures due to man's activities are being established by accounting for all other -- that is, natural -- losses. The point is so well-established that New Mexico's persistent reargument of it is troubling because the likelihood is that, unless directed otherwise by the Court, New Mexico will revive the argument before the River Master, who will not be a lawyer familiar with finality principles.

incorporation of law of the case doctrine into original jurisdiction cases because it would undermine "to an intolerable extent the finality of...decrees in original actions[.]" *Id.*, at 619. The case's statutory rather than equitable base, the presence in the existing decree of a provision retaining jurisdiction, and the importance of fixed calculations in water rights cases were the important elements leading the Court to its conclusion. The Court observed:

Our long history of resolving disputes over...water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made.

*Id.*, at 623-24.

Here, as in *Arizona v. California*, the Court is confronted with an effort to reopen an issue that already has been resolved and embodied in a decree which contains a provision retaining jurisdiction. Here, as in *Arizona v. California*, this effort to reopen is made in an interstate water dispute within the Court's original jurisdiction which rests primarily on a statutory base -- the Compact -- rather than an equitable one. The applicability of the *Arizona v. California* finality doctrine is even clearer in this case. The decree which New Mexico seeks to reopen is much fresher. The only reason New Mexico offers for reopening is that, by reanalyzing pre-existing evidence, it thinks it can establish a point it failed to establish less than a year ago. There is no basis for reopening the issue of how to compute the effect of man's activities on departures from New Mexico's delivery obligations. A method has been established and adopted for the case and incorporated into the Manual which will govern the River Master. Revision of it now risks unravelling all the agreements embodied in the Manual.



## II.

**The Compact and last Term's decision require future annual accountings and reject the concept that New Mexico may accrue water debts to Texas over several years and only repay a limited portion of them.**

As already noted, *supra* at 3 n.3, New Mexico makes an unenthusiastic argument that it should not be subject to an annual accounting of its delivery obligation and repayment of any shortfalls within fifteen months of the end of the water year during which the water originally was to have been delivered. The Compact itself, its history, explicit statements and implicit holdings in last Term's decision, as well as prudent administration of the Compact, all operate to rebuff New Mexico's effort.

Article VI(b) of the Compact itself contemplates annual accountings using progressive three-year averages. The historical background of the Compact reveals a similar emphasis on the fact that the Compact creates a legally enforceable annual delivery obligation. Mr. Tipton, the Chair of the Engineering Advisory Committee at the time the Compact was negotiated, explained Article III(a):

What it means is that of a given inflow Texas will receive *each year* essentially the same proportion which she received under the "1947 condition."

Subparagraph (a) of article III is a *firm obligation* on the part of New Mexico to see that Texas receives that quantity of water...

Stip. Exh. 1, S. Doc. 109 (81st Cong., 1st Sess. (1949), at 116 (emphasis added).

Last Term's decision in this case directed the appointment of a River Master to make calculations on delivery obligations "annually". 107 S.Ct. at 2287. This explicit rejection of the point for which New Mexico now argues accompanied another rejection of New Mexico's current argument. New Mexico's second exception to the 1986 Report was premised on its claim that the Compact "does not provide for an annual accounting..." New Mexico's 1987 Exceptions, at 24. The Court overruled this exception. 107 S.Ct. at 2283-84.

Finally, prudent Compact administration counsels rejection of New Mexico's argument. As the Special Master explains, the only realistic way of honoring the established principle that New Mexico must deliver water to Texas under the Compact is "to make the delivery obligation an annual one." 1987 Report, at 3. Under any other approach, given its history of consistent underdeliveries, New Mexico would fall so far behind that it could never hope to repay Texas the accumulated water debt. *Id.*

New Mexico's specific proposal for the accrual of water debt actually goes far beyond an argument for the simple accrual of debt. See New Mexico's 1988 Exceptions, Appendix D. It seeks the forgiveness of all shortfalls that do not exceed thirty percent of its delivery obligations for five consecutive years. Nowhere in its perfunctory treatment of the accrual issue does New Mexico point to a Compact provision that in any way could be read to justify this approach. Being even further astray from the field covered by the Compact than the already rejected shortfall accrual effort, this accrual and forgiveness effort also must fail.

## **CONCLUSION**

For the foregoing reasons, the exceptions of the State of New Mexico to the 1987 Report of the Special Master should be overruled.

Respectfully submitted,

**JIM MATTOX**

Attorney General of Texas

**MARY F. KELLER**

First Assistant Attorney General

**RENEA HICKS\***

Special Assistant Attorney General

**NANCY N. LYNCH**

Chief, Environmental Protection  
Division

**PAUL ELLIOTT**

Assistant Attorney General

P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
(512) 463-2085

Attorneys for Plaintiff

February 25, 1988

\*Counsel of Record





No. 65, Original

Supreme Court, U.S.

FILED

MAR 11 1988

JOSEPH F. ANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1987

STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

**NEW MEXICO'S MOTION FOR LEAVE TO  
FILE REPLY BRIEF AND REPLY ON  
EXCEPTIONS TO SPECIAL MASTER'S REPORT**

HAL STRATTON  
*Attorney General of New Mexico*

HENRY M. BOHNHOFF  
*Deputy Attorney General*

PETER THOMAS WHITE \*  
ERIC RICHARD BIGGS  
*Special Assistant Attorneys General*

New Mexico Interstate  
Stream Commission  
Bataan Memorial Building, Room 101  
Santa Fe, New Mexico 87503  
(505) 827-6150

*\*Counsel of Record*

March 10, 1988



---

No. 65, Original

---

IN THE  
**Supreme Court of the United States**

October Term, 1987

---

STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

---

**NEW MEXICO'S MOTION  
FOR LEAVE TO FILE REPLY BRIEF**

---

Pursuant to Rules 9.2 and 9.6 of the Rules of the Supreme Court of the United States, New Mexico requests the Court for leave to file the attached Reply Brief. In support whereof, New Mexico states:

1. New Mexico filed Exceptions to the Report of the Special Master and Brief in Support of Exceptions on January 26, 1988. Texas' Reply to New Mexico's Exceptions was filed on or about February 25, 1988, and was received by New Mexico February 29, 1988.

2. Texas' Reply is based on an erroneous legal theory and distorts the nature of the proceedings and the state of the evidence.

3. Texas' Reply makes assertions about New Mexico's factual and legal posture which are incorrect and prejudicial.

4. A decision of this Court based upon the assertions recited in Texas' Reply would be highly injurious to established property interests in New Mexico and to the livelihood of New Mexico's citizens.

WHEREFORE, New Mexico moves the Court for leave to file the attached New Mexico's Reply on Exceptions to Special Master.

Respectfully submitted,

HAL STRATTON

*Attorney General of New Mexico*

HENRY M. BOHNHOFF

*Deputy Attorney General*

PETER THOMAS WHITE

ERIC RICHARD BIGGS

*Special Assistant Attorneys General*

New Mexico Interstate

Stream Commission

Bataan Memorial Building, Room 101

Santa Fe, New Mexico 87503

(505) 827-6150

March 10, 1988

## TABLE OF AUTHORITIES

Page

### CASES:

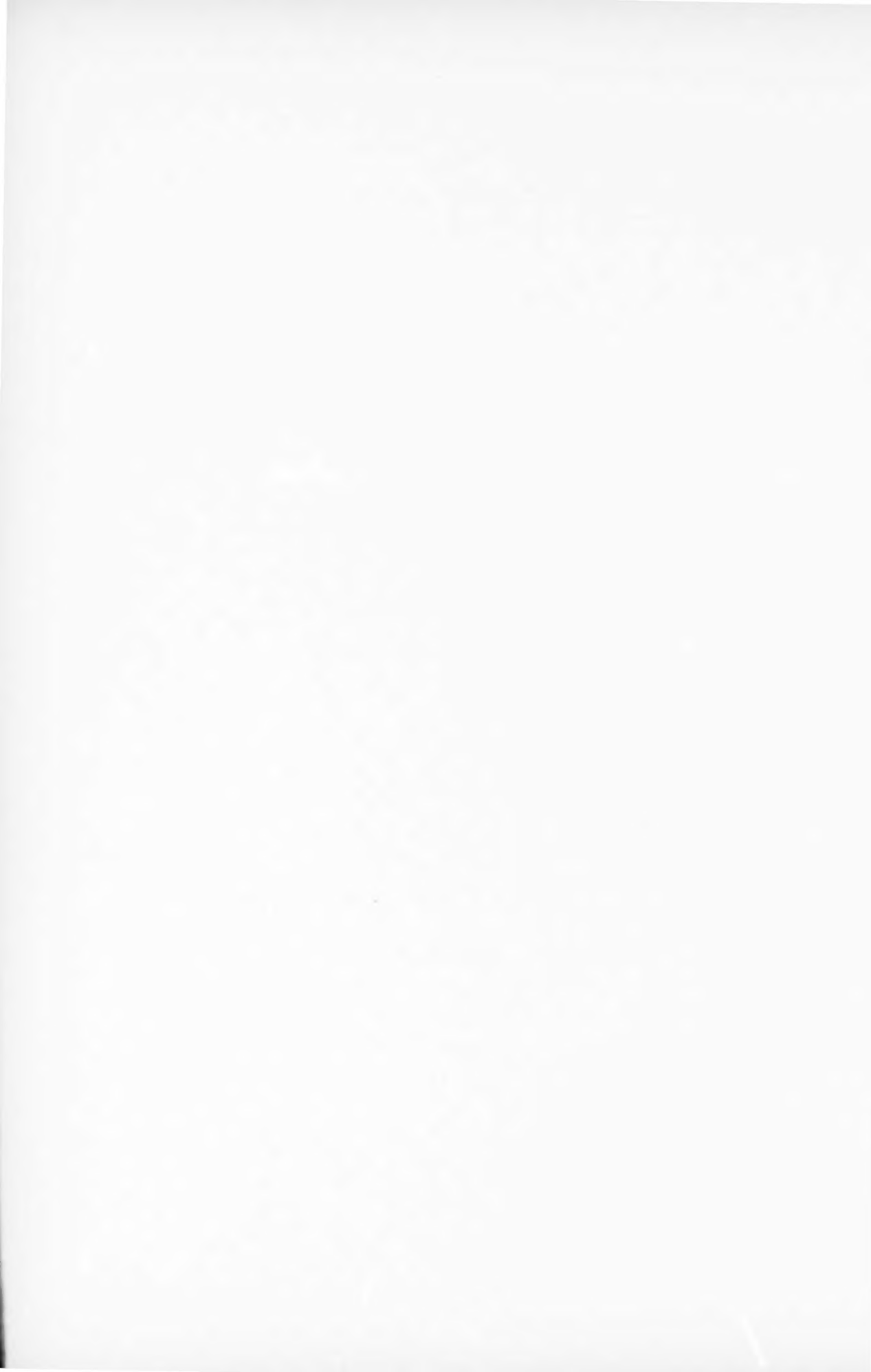
<i>Arizona v. California</i> , 460 U.S. 605 (1983) .....	4
<i>City of Raton v. Vermejo Conservancy Dist.</i> , 101 N.M. 95, 678 P.2d 1170 (1984) .....	5
<i>Colorado v. Kansas</i> , 320 U.S. 383 (1943) .....	6
<i>Hartford Life Ins. Co. v. Blincoe</i> , 255 U.S. 129 (1921) .....	4
<i>Monroe Div., Litton Business Systems v. DeBari</i> , 562 F.2d 30 (10th Cir. 1977) .....	5
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945) .....	5
<i>North Carolina R.R. Co. v. Story</i> , 268 U.S. 288 (1925) .....	5
<i>Oklahoma v. Texas</i> , 256 U.S. 70 (1921) .....	4
<i>Texas v. New Mexico</i> , No. 65, Original, 462 U.S. 554 (1983) .....	2
107 S.Ct. 2279 (1987) .....	2, 6
Special Master Report – October 15, 1979 .....	5
Special Master Report – July 29, 1986 .....	2
Special Master Report – December 7, 1987 .....	2, 3
<i>Virginia v. West Virginia</i> , 220 U.S. 1 (1911) .....	5
<i>Wisconsin v. Illinois</i> , 281 U.S. 179 (1930) .....	3

### STATUTES:

Pecos River Compact, 63 Stat. 159 .....	<i>passim</i>
--	---------------

### OTHER:

1B J. Moore & T. Currier, <i>Moore's Federal Practice</i> , Paras. 0.404[1], 0.404[10] (1984) .....	4
--	---



---

No. 65, Original

---

IN THE  
**Supreme Court of the United States**

October Term, 1987

---

STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO,  
*Defendant,*

UNITED STATES OF AMERICA,  
*Intervenor.*

---

**NEW MEXICO'S REPLY  
ON EXCEPTIONS TO SPECIAL  
MASTER'S REPORT**

---

New Mexico submits this reply in response to Texas' Reply to New Mexico's Exceptions (Texas' Reply), dated February 25, 1988, and received by New Mexico February 29, 1988.

**SUMMARY OF ARGUMENT**

Texas' Reply disregards the substance of New Mexico's concerns and distorts the issues before the Court. New Mexico does not challenge the adjudication of its obligation to Texas, or the calculation of the quantity owed for past shortfalls. When the Court approved the Special Master's calculation of



past underdeliveries of water under the Pecos River Compact, it remanded the remedies question to the Special Master for future consideration, and enjoined New Mexico to comply with its Article III(a) obligation in the future. *Texas v. New Mexico*, 107 S. Ct. 2279, 2283-86 (1987). The Special Master's 1987 Report addressed "the regime that will govern the river from 1987 forward." 1987 Report at 1. In doing so, the Master made a serious legal error, to New Mexico's prejudice. To deny New Mexico an opportunity to seek redress, as Texas urges, would be unconscionable.

### ARGUMENT

New Mexico does not challenge the Court's 1987 decision, and Texas is mistaken to suggest otherwise. *See* Texas' Reply at 3. The Court's 1987 decision is res judicata concerning New Mexico's past obligations to Texas. The distinction between past and future compliance, however, has always been inherent in the Court's treatment of this case. *See, e.g.*, 107 S. Ct. at 2283; 462 U.S. 554, 574-75 (1983). What the Court in 1987 did not do, and what the Special Master has recommended in his 1987 Report that the Court do, is to implement *future* determinations of New Mexico's compliance with its obligations under the Compact by utilizing a legal presumption. *See* 1987 Report at 4-5.

To do this, the Special Master returned to the presumption he had utilized previously to conclude that the departures derived from Table 2 of Texas Exhibit 79 were all due to man's activities in New Mexico, and were therefore all chargeable to New Mexico. *See* 1987 Report at 9; 1986 Report at 8-9. Texas, in its Reply, states that "no such presumption is being made," though "New Mexico persists in asserting" otherwise. Texas' Reply at 6 n.4. The fact is that the Special Master himself has referred to "the presumption that the accumulated negative departures from the 1947 condition, presented in

Table 2 of the exhibit, are a result of man's activities." 1986 Report at 8. The Master also decided that the departures shown in Texas Exhibit 79 constituted "New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise," which in the course of a burden of proof dispute it had not done. *Id.* at 10. In his 1987 Report, the Master considered his previous determinations to be the law of the case and rejected New Mexico's uncontradicted evidence that the methodology used to compute stateline departures in Texas Exhibit 79 discounts the unpredictability and peculiarities of the Pecos. 1987 Report at 4-5; see Tr. at 28 (October 15, 1987).

New Mexico does not seek to reopen the issue of its liability for past underdeliveries to Texas; that issue is over and done with. What is at hand here is an inquiry into whether the law of the case doctrine requires that techniques and inferences which had been approved by the Court's 1987 opinion to determine past shortfalls must be used to determine shortfalls in the future. In requiring for the future the tools developed for the past, the Special Master has made a profound error.

The man's activities presumption tends to exaggerate New Mexico's future liability for underdeliveries, and potential credits for overdeliveries. Simply stated, the presumption assumes that because Texas Exhibit 79's methodology accounts for all natural losses, any residual negative departure is due to man's activities. New Mexico's evidence at the October 15, 1987 hearing conclusively demonstrated that the presumption is faulty. Use of this presumption distorts New Mexico's obligation and will cause vast and irreparable harm to New Mexico. *Cf. Wisconsin v. Illinois*, 281 U.S. 179, 200 (1930) (plaintiffs' claims "should not be pressed to a logical extreme without regard to relative suffering"). Over a period of years, the presumption will harm both states and will make the Compact unworkable. The Court should not mandate the use of

Texas Exhibit 79 without allowing any subsequent procedure to determine or even address what part, if any, of future negative departures is attributable to man's activities. If the Court were to countenance the consequences of this new use of the Special Master's presumption, grave inequities to New Mexico would result.

Texas argues for an unthinking and inappropriate reliance on principles of finality. Texas relies exclusively on *Arizona v. California*, 460 U.S. 605 (1983), to support its argument that New Mexico is foreclosed from raising its concerns. See Texas' Reply at 6-7. *Arizona v. California* supports New Mexico, not Texas. *Arizona v. California* dealt with the finality of the past adjudication of water rights, and whether Indian interests were adequately represented by the United States in that adjudication, not with the standards for enforcing rights in the future. See *id.* at 625-28. Compare *id.* with *Oklahoma v. Texas*, 256 U. S. 70, 78 (1921). New Mexico is not asking the Court to "reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made," 460 U.S. at 623-24, but to allow the Special Master or River Master to consider for the first time the appropriate techniques by which to measure New Mexico's future compliance with the Compact. This will encourage the stability of Western water law, not the reverse. See *id.* at 620.

While "[a] court's decision to reconsider a prior ruling before the case becomes final . . . is ultimately a matter of 'good sense,'" and "federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling," courts "have regarded finality concerns as less compelling when the question at issue has never actually been contested." *Id.* at 644 (Brennan, J., dissenting) (citing *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 136 (1921); 1B J. Moore & T. Currier, *Moore's Federal Practice* paras. 0.404[1], 0.404[10] at 408, 573 (1984)). Moreover,

when what is sought is not the reconsideration of a court's prior ruling at all, but consideration of methods by which the enforcement of previously declared rights may take place, standards of finality do not apply. See *North Carolina R.R. Co. v. Story*, 268 U.S. 288, 292-94 (1925) (res judicata did not bar a suit to enjoin enforcement of a judgment); *Monroe Div., Litton Business Systems v. DeBari*, 562 F.2d 30, 33 (10th Cir. 1977) (Breitenstein, J.) (after entry of injunction, collateral estoppel did not bar defendant's right to be heard on his claim for damages resulting from wrongful injunction); *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 100-01, 678 P.2d 1170 (1984) (laches did not bar District from seeking to enforce senior water right priority based on 1935 decree).

An example will illustrate the practical unworkability as well as the legal error and unfairness inherent in Texas' position. Assume that New Mexico were to take whatever action were necessary to comply with the Court's decree in this case. If the Special Master's presumption continued to apply, any further departures automatically would be considered to be due to man's activities. If there is a maldistribution of flood inflows, liabilities may result to New Mexico which it could not control and for which its citizens would have to suffer to the unearned benefit of Texas. See Special Master's October 15, 1979 Report at 15. This inequity would be inimical to the principles of equitable apportionment and interstate comity which informed the Compact, see Art. I, and the Supreme Court's admonition that an original action "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy," because "[a] State is superior to the forms it may require of its citizens." *Virginia v. West Virginia*, 220 U.S. 1, 27-28 (1911). See *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (interstate water controversies "involve the interests of quasi-sovereigns, present complicated

and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule") (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)).

Texas seriously misunderstands New Mexico's argument concerning the accumulation of shortfalls. New Mexico did not include that argument "perfunctorily," as Texas suggests: it is an essential alternative to provide for flexibility in administration of the widely varying flows of the river, if the problem of proving the extent to which man's activities cause stateline departures is not resolved. The accumulation of shortfalls, however, would not in itself solve that problem. Texas states that New Mexico opposes an annual accounting of shortfalls and repayment. Texas' Reply at 3. New Mexico does not oppose an annual accounting, though it does oppose an annual repayment of shortfalls without accrual.

It is incorrect to assert that under New Mexico's plan Texas would be permanently deprived of 30% of its entitlement. The plan would require that New Mexico's *total* shortfall accrued after 1986 shall never exceed 30% of the delivery obligation in *any* period of five consecutive years. The shortfall in excess of 30% would be repaid the following year. There is nothing in the Compact, its history, or previous Court decisions which would counsel against adoption of this plan. The Court's 1987 decision allows for it. See 107 S. Ct. at 2287 (River Master's calculations will include determinations of negative or positive departures from New Mexico's delivery obligation and such shortfalls or credits will be reflected in that State's later delivery obligations"). Prudent Compact administration certainly does not counsel against the plan's adoption; it favors it.

Texas accuses New Mexico of constructing a technical veneer to obscure its argument. To the contrary, Texas is ignoring the technical and legal reality of the case by attempting to hide behind an overly simplistic and erroneous reading

of a single Supreme Court precedent. Texas' argument exalts form over substance. This case is not about *res judicata*, but about whether the law of the case requires that an evidentiary or logical presumption, used to resolve one set of facts, should be applied to different sets of facts as they arise in the future. Texas seeks to set in stone methodology that New Mexico has proved faulty by uncontested evidence. If Texas' argument is accepted, the efforts of the states in negotiating the Compact in an attempt to live equitably with the vagaries of the Pecos will be negated, New Mexico and its citizens will suffer, and this nation's interest in just resolutions of Compact Clause disputes in the original jurisdiction of the Court will be harmed.

### CONCLUSION

For all the above reasons, New Mexico's exceptions to the 1987 Report of the Special Master should be sustained.

Respectfully submitted,

HAL STRATTON

*Attorney General of New Mexico*

HENRY M. BOHNHOFF

*Deputy Attorney General*

PETER THOMAS WHITE

ERIC RICHARD BIGGS

*Special Assistant Attorneys General*

New Mexico Interstate

Stream Commission

Bataan Memorial Building, Room 101

Santa Fe, New Mexico 87503

(505) 827-6150

March 10, 1988



# SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS, PLAINTIFF v. STATE OF  
NEW MEXICO

ON MOTION FOR ALLOWANCE OF INTERIM FEES AND  
DISBURSEMENTS

No. 65, Orig. Decided March 21, 1988

The motion of the Special Master for allowance of interim fees and disbursements is granted.

JUSTICE BLACKMUN, dissenting.

Charles J. Meyers, formerly the Dean of Stanford Law School and now a partner in the Denver branch of Gibson, Dunn & Crutcher, a large Los Angeles law firm, on July 2, 1984, was appointed by this Court, see 468 U. S. 1202 (1984), to succeed the Honorable Jean S. Breitenstein, Senior Judge of the United States Court of Appeals for the Tenth Circuit and since deceased, as Special Master in this litigation between Texas and New Mexico.

In December 1985, the successor Master filed an application for interim fees of \$33,511.00 and for reimbursement of expenses of \$702.09, a total of \$34,213.09. That request was granted by the Court over three dissenting votes. See 475 U. S. 1004 (1986). Chief Justice Burger, writing for the dissenters, complained about Master Meyers' omission of "any information concerning the experience levels of the four attorneys for whose services he seeks to charge"; about the absence of any statement that the four even were members of the Bar; and about the lack of information as to hourly rates charged. The Chief Justice cited his corresponding dissent to the allowance of compensation requested by this same applicant as Master in *Louisiana v. Mississippi*, 466 U. S. 921 (1984). He repeated his earlier observation that a Special Master's charges, when allowed by the Court, "'represent our assurance to the parties that the charges are reasonable and proper,'" and that this is so even where "the parties do not oppose the application." The Chief Justice also noted:



"I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." He stated: "The contending litigants have a right to expect this Court to exercise its independent judgment on fees rather than requiring each or both of them to challenge the amounts." 475 U. S., at 1004-1005.

In September 1986, this Special Master once again moved for interim fees, this time for an amount totaling \$69,608.50. The Court granted that motion as well. — U. S. — (1986).

The present application for more interim fees and for reimbursement of expenses was filed January 11, 1988. Master Meyers now requests \$69,661.25 in fees and \$2,544.37 for expenses, a total of \$72,205.62. He says that these amounts are those incurred since the interim allowance of \$69,608.50 in late 1986.

The applicant attaches a computer printout to his motion. He asserts that nearly all the work during this period was performed either by him or by Diana Poole, "who has replaced Steven Crafton as my law clerk on this matter"; that clerk Crafton left the Denver office of the firm in August 1986; and that Ms. Poole assumed her duties in July 1987 and, revealingly, "expended considerable effort in the early months mastering the background of the case before commencing research on the issues arising in devising a decree."

The Master points out once again that he is a partner in his law firm and is head of its "Natural Resources Group"; that he received his law degree from the University of Texas and his Master's and doctoral degrees from Columbia University; and that he has taught at Texas, Columbia, and Stanford, and was dean of Stanford Law School for five years. He states that Ms. Poole received her law degree in 1984 from the University of Minnesota, where she was an editor of the Law Review, and that she now is an associate (nonpartner) lawyer in his firm's Denver office. She worked for one year as a law

clerk for Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit, and "has been in private practice for over three years."

The Master requests compensation for his time at a "weighted average" of \$275.12 per hour. He requests compensation at a "weighted average" of \$191.30 per hour for the time of Ms. Poole. He says that he spent 85.25 hours on the case; that Ms. Poole spent 246.25 hours; and that small additional amounts of time were expended by former clerk Crafton and by one L. A. O'Neill, who, for all we know, may have been a paralegal and not a lawyer.

It seems apparent—indeed the Master so concedes when he describes the nature of the "early months" of her work on the case—that a substantial amount of Ms. Poole's time was self-education as to the issues and was duplicative background work already performed by former clerk Crafton who had left the Denver office. The consequences of Crafton's departure hardly are to be charged to these litigants. It also is difficult for me to accept the fact that in Denver, Colorado, this partner's time is now worth \$290.00 an hour, having been increased from \$265 on November 1, 1987, and that the time of Ms. Poole is now worth \$200.00 an hour, having been elevated from \$170.00 beginning November 1, 1987. Ms. Poole, after all, was only four years out of law school and only three years in practice. I cannot agree that so recent a law school graduate, no matter how inherently bright she may be, of such limited experience can be said to be worth that amount in a case the retired Chief Justice described as possessing a "public service aspect."

This Court does have a duty to the public and to the parties when it approves a Master's request for fees. The fact that the two States which are the parties to this litigation have not lodged specific objections to the fees is of no great relevance. The States, after all, are parties and are consigned in their continuing litigation to this same Master.

I would reduce the request for interim fees from the asserted amount of \$69,661.25 to \$50,000.00 to reflect both a reasonable amount of time necessarily expended and realistic charges. I would also reduce the request for reimbursement for expenses by \$240.00, an amount described as having been paid for secretarial overtime. There is no explanation proffered by Master Meyers as to why this overtime was necessary. He can and should be more specific in his accounting to this Court.

I add that it seems to me that "establishment" law firms are doing themselves and the public a disservice by asserting fees of this magnitude so persistently over dissents from the Court. Public dissatisfaction with lawyers is not unknown; neither is public distrust of lawyers. A fee application of this kind tends to build that dissatisfaction and that distrust.

It is enlightening, incidentally, to compare with this application the fees recently charged by two very distinguished lawyers who served this Court as Special Masters on other similar assignments. See *South Carolina v. Baker*, — U. S. — (1987), and *Kansas v. Colorado*, — U. S. — (1988).

I dissent.

JUSTICE STEVENS took no part in the consideration or decision of this motion.

# SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS, PLAINTIFF *v.* STATE OF  
NEW MEXICO

ON BILL OF COMPLAINT

No. 65, Orig. Decided March 28, 1988

PER CURIAM.

Last Term we issued a decree in this case which enjoined the State of New Mexico "to comply with its Article III(a) obligation under the Pecos River Compact and to determine the extent of its obligation in accordance with the formula approved by the decisions of this Court." *Texas v. New Mexico*, 482 U. S. —, — (1987). We retained jurisdiction for the purpose of any order, direction, or modification of the decree as might be deemed proper. In particular, we approved the Special Master's recommendation that a River Master be appointed in this case, and requested that on remand the Special Master "recommend an amendment to the decree, specifying as he deems necessary the duties of the River Master and the consequences of his determinations. Any other suggestions for amendments should also be called to our attention." *Id.*, at —.

The Special Master has now submitted a report, which includes a proposed amended decree. New Mexico's motion for leave to file a reply brief is granted. New Mexico's exceptions to the report are overruled. The report is approved and an amended decree will issue forthwith. The Special Master has also recommended a person to serve as River Master. We accept that recommendation.

## AMENDED DECREE

It is Ordered, Adjudged, and Decreed that:

## I

## DEFINITIONS

## A. For purposes of this Decree:

1. "Accounting year" is the calendar year during which the River Master makes the calculations required by Article III.B.1. below; "water year" is the calendar year immediately preceding the accounting year.

2. "Manual" is the Pecos River Master's Manual admitted into evidence as Texas Exhibit 108, which is an integral part of this Decree. The Manual may be modified from time to time in accordance with the terms of this Decree.

3. "Overage" is the amount of water delivered by New Mexico in any water year which exceeded the Article III(a) obligation for that year.

4. "Shortfall" is the amount by which the water delivered by New Mexico in any water year fell short of the Article III(a) obligation for that year.

## II

## INJUNCTION

## A. The State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:

1. To comply with Article III(a) of the Pecos River Compact and to meet the obligation thereof by delivering water to Texas at state line as prescribed in this Decree.

2. Within thirty (30) days of receipt of a final Report of the River Master identifying a shortfall, to submit to the River Master a proposed plan providing for verifiable action by New Mexico that will increase the amount of water at state line prior to March 31 of the year follow-

ing the accounting year by the amount of the shortfall. In order to identify the incremental amount of water being delivered to Texas to satisfy a prior shortfall, the plan shall:

(a) Identify the specific actions to be taken by New Mexico to increase the amount of water flowing to Texas, including, if applicable, the points at which water will enter the river or diversions will be curtailed;

(b) Specify the dates and times the actions will be taken;

(c) Provide a calculation under the procedures and equations set forth in the Manual of the amount of water that can be presumed to arrive at state line as a result of the actions;

(d) Identify the means by which the actions can be verified and provide assurances that documents and data necessary for verification will be submitted to the River Master within thirty (30) days from the date the actions are taken;

(e) Provide guarantees that the water to be delivered pursuant to the plan will not be diverted within New Mexico.

3. To comply prior to March 31 of the year following the accounting year with the terms of an Approved Plan to remedy any shortfall. Compliance with an Approved Plan will be deemed to satisfy the shortfall. Subject to the review provided in Article III.D. of this Decree, the calculations made pursuant to Article II.A.2(c), as approved by the River Master, shall be determinative of the amount of water delivered at state line.

### III

#### RIVER MASTER

A. *Appointment.* The appointment of a River Master is made by the attached Order of Appointment.



B. *Duties.* The River Master shall perform the following duties:

1. Calculate in accounting year 1988, beginning with water year 1987, and continuing every year thereafter, pursuant to the methodology set forth in the Manual:
  - a. The Article III(a) obligation;
  - b. Any shortfall or overage, which calculation shall disregard deliveries of water pursuant to an Approved Plan;
  - c. The net shortfall, if any, after subtracting any overages accumulated in previous years, beginning with water year 1987.
2. Deliver to the parties a Preliminary Report setting forth the tentative results of the calculations required by Section III.B.1. of this Decree by May 15 of the accounting year;
3. Consider any written objections to the Preliminary Report submitted by the parties prior to June 15 of the accounting year;
4. Deliver to the parties a Final Report setting forth the final results of the calculations required by Section III.B.1. of this Decree by July 1 of the accounting year;
5. Review any plan proposed by New Mexico pursuant to Article II.A.2. of this Decree for its efficacy in satisfying any shortfall and consider any written objections to the plan which are submitted by Texas by September 1 of the accounting year.
6. Modify the proposed plan as is deemed necessary to ensure satisfaction of the shortfall and deliver to the parties such Approved Plan by October 1 of the accounting year;
7. Deliver to the parties and file with this Court a Compliance Report by June 1 of the year following any accounting year in which there is an Approved Plan, which report shall include a finding of New Mexico's



compliance or noncompliance with the terms of the Approved Plan and the reasons for such finding.

C. *Modification of Manual.*

1. The River Master shall modify the Manual in accordance with any written agreement of the parties. Such written agreement shall state the effective date of the modification and whether it is to be retroactive. If retroactive, the agreement shall specify the procedures for making the retroactive adjustments.

2. Absent written agreement of the parties, upon motion by either party and for good cause shown, the River Master may modify the Manual. Opposition to any such motion shall be submitted to the River Master in writing within thirty (30) days after service of the motion or within such extended time as may be allowed by the River Master. Additional written submissions and any oral presentation will be at the River Master's discretion. The River Master may adopt, reject, or amend the proposed modification and shall serve upon the parties his or her written Modification Determination and the grounds therefor. The River Master may also defer decision on a proposed modification, but if no action is taken within one (1) year of its submission, the motion shall be deemed denied.

3. A modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective.

4. All modifications of the Manual shall be transmitted immediately to the Clerk of this Court and shall be retained in the files for this case.

D. *Effect of River Master's Determination.* Unless stayed by this Court, any Final Report, Approved Plan, Compliance Report, or Modification Determination (hereinafter, collectively, "Final Determination") shall be effective upon its adoption, and shall be subject to review by this

Court only on a showing that the Final Determination is clearly erroneous. A party seeking review of a Final Determination must file a motion with the Clerk of this Court within thirty (30) days of its adoption, which motion shall set forth the Final Determination on which review is sought and a concise statement of the basis of the claim that the Final Determination is clearly erroneous.

*E. Authority of Pecos River Commission.* Nothing in this Decree is intended to displace the authority of the Pecos River Commission to administer the Pecos River Compact, and if the Commissioners reach agreement on any matter, the parties shall advise the Court and seek an appropriate amendment to this Decree.

*F. Communication with River Master.* *Ex parte* communications with the River Master are forbidden. Any written communication with the River Master by motion or otherwise shall be simultaneously served by mail on the opposing party. Any oral communication with the River Master shall be made in the presence of the opposing party, whether by telephone conference call or in person.

*G. Distribution of Costs.* The compensation of, and the costs and expenses incurred by, the River Master shall be approved by the Court and borne equally by the State of Texas and the State of New Mexico.

#### IV

##### DISMISSAL OF UNITED STATES

A. The United States is dismissed from this proceeding without prejudice.

#### V

##### RETENTION OF JURISDICTION

The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

JUSTICE STEVENS took no part in the consideration or decision of this case.

#### ORDER APPOINTING RIVER MASTER

IT IS ORDERED that Neil S. Grigg be and he hereby is appointed River Master of the Pecos River for the purpose of performing the duties set forth in the Amended Decree of March 28, 1988.

IT IS FURTHER ORDERED that the River Master shall have the power and authority to subpoena information or data, compiled in reasonable usable form, which he deems necessary or desirable for the proper and efficient performance of his duties.

IT IS FURTHER ORDERED that the River Master is allowed his necessary expenses and reasonable fees for his services, statements for which shall be submitted quarterly to the Court for its approval. Upon Court approval, such statements will be paid by the State of New Mexico and the State of Texas.

IT IS FURTHER ORDERED that if the position of River Master becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

JUSTICE STEVENS took no part in the consideration or decision of this order.